

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-712

COMMONWEALTH

vs.

KHAJAG P. BIRINDJIAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a bench trial in the Central Division of the Boston Municipal Court, the defendant, Khajag Birindjian, was convicted of the negligent operation of a motor vehicle, resisting arrest, and threatening to commit a crime. He now appeals only the conviction of negligent operation, claiming that the evidence was insufficient to support the conviction. We affirm.

Background. A jury could have found the following facts to be true. On May 21, 2016, at approximately 12:35 A.M., Officer Wayne Thornhill of the Massachusetts Bay Transportation Authority (MBTA) Police Department was conducting checks in a marked police cruiser around MBTA stations in the downtown Boston area. While on Atlantic Avenue, his attention was drawn to a blue sedan stopped at a red light. The car was occupied by four males and the operator was yelling profanities out of the

window. Thornhill observed the car "spinning" and "screeching" its tires as if participating in a "drag race," which created billowing smoke from underneath the car. There were other cars on the road and pedestrians on the sidewalk. When the light turned green, the car sped off at a "beyond greater than reasonable" speed. Thornhill activated his police lights and siren and pursued the defendant's car. Once Thornhill had caught up to the defendant's car, the defendant traveled another three city blocks for roughly one minute until the defendant pulled his car over on Broad Street. After the defendant had stopped his car, he revved the engine loudly, attracting a crowd of bystanders that began filming the incident.

Before Thornhill could exit his cruiser, the defendant, who was the operator of the car, exited his car "suddenly" and started walking back toward Thornhill's cruiser. In turn, Thornhill exited his cruiser and told the defendant to return to his car. The defendant then "began to yell profanities at [Thornhill] and kept moving forward, closing the distance between [them], in an aggressive manner, [waving] his hands up in the air and yelling profanities." The defendant was swaying back and forth as he was walking. Thornhill, fearing for his safety, conducted a patfrisk of the defendant. The defendant had a "moderate odor of an alcoholic beverage emanating from his person," his eyes were bloodshot, and his speech was slurred.

When attempting to provide his driver's license to Thornhill, the defendant initially provided his debit card. With the assistance of other officers who had arrived at the scene, Thornhill was able to handcuff and arrest the defendant and transport him to the police station for booking.

The defendant was charged with a variety of crimes and civil infractions, including one count of reckless operation of a motor vehicle in violation of G. L. c. 90, § 24 (2) (a) (count two).¹ Thornhill was the only testifying witness during trial. After the Commonwealth rested, the defendant's motion for a required finding of not guilty on count two was denied, but the judge reduced the charge from reckless operation to negligent operation. The defendant was found guilty. He timely appealed.

Discussion. On appeal, the defendant argues that revving the engine and creating smoke with a car's tires while stopped at a traffic light poses "little to no immediate danger" and is insufficient to support a conviction of negligent operation of a motor vehicle. In reviewing the sufficiency of the evidence, we

¹ The defendant also was charged with operating under the influence of liquor, operating an uninsured motor vehicle, failure to stop for police, a number plate violation to conceal identification, disorderly conduct, resisting arrest, and threatening to commit a crime. He also was cited for the civil infractions of an unregistered motor vehicle, possession of an open container of alcohol, a number plate violation, registration not in possession, and improper operation of a motor vehicle.

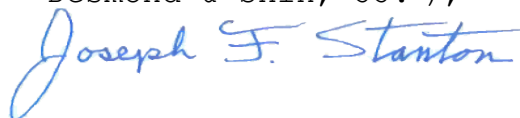
look to see "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Merola, 405 Mass. 529, 533 (1989), quoting Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). To obtain a conviction of negligent operation of a motor vehicle, "the Commonwealth must prove that the defendant (1) operated a motor vehicle, (2) upon a public way, (3) (recklessly or) negligently so that the lives or safety of the public might be endangered." Commonwealth v. Duffy, 62 Mass. App. Ct. 921, 921 (2004). We ask whether the defendant's driving had the potential to cause danger to the public, not whether it actually did. See Commonwealth v. Constantino, 443 Mass. 521, 526-527 (2005).

Here, the evidence was sufficient to support the conviction. The defendant was revving his engine and spinning his tires similar to a "drag race on TV" on a busy street in downtown Boston on a Friday night. He was yelling profanities out of the car. Smoke was "billowing" from underneath the car. Thornhill testified that operating a car in this manner means that "[m]any things can go wrong," including "creat[ing] a dangerous hazard for pedestrians who are walking on the street, other vehicles either next to that particular vehicle or adjacent or parallel, given that at any moment in time that

vehicle could take off at a high rate of speed."² Indeed, when the light turned green, he witnessed the defendant's car accelerate noticeably quickly. Additionally, the defendant displayed indicia of alcohol use.³ See Commonwealth v. Ferreira, 70 Mass. App. Ct. 32, 35 (2007). All told, we discern no error.

Judgment affirmed.

By the Court (Hanlon,
Desmond & Shin, JJ.⁴),



Clerk

Entered: July 15, 2019.

² Thornhill also testified that this course of operation creates a hazardous environment "due to the revving of the engine and the spinning of the tires."

³ See Commonwealth v. Woods, 414 Mass. 343, 350 (1993) ("Evidence that the defendant was consuming alcohol prior to driving with passengers late at night is patently relevant to whether the defendant exercised reasonable care while driving").

⁴ The panelists are listed in order of seniority.